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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-847

CLIFFORD JONES a.k.a. GLASSES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

INDEX

	Page
Citations To Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Reason for Granting the Writ	4
1. The Trial Court erred in overruling Defendant's Motion for a New Trial for the reason that he was denied his constitutional right to trial by a fair and impartial jury	4
2. Coincident with the thesis that the defendant did not have a fair and impartial trial by jury under Amendment VI of the Constitution of the United States it is contended that he was not accorded his constitutional right to Due Process under Amendment V of that same document	5
Conclusion	7

Cases Cited

Betts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 Ed. 1595	5
1 Burr's Trial, 414, 415, 25 Fed. Cas. 14, 692, at p. 50	4
Dennis v. U.S., 339 U.S. 176, 70 S. Ct. 519	5
People v. Mol, 137 Mich. 692, 100 N.W. 913	4
Priestly v. State, 19 Ariz. 317, 171 P. 137, 3 A.L.R. 1201	4

INDEX—Continued

	Page
Steve Casias v. United States, 315 F. 2d 614 (10th Cir.)	6
U.S. v. Swanson, 73-1151 (8th Cir.)	6
Statute Cited	
Amendment VI of the Constitution of the United States	4

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UNITED STATES OF AMERICA,
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on October 29, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, entered on October 29, 1973, is printed in Appendix "A" hereto, infra pages 8-12, and is reported in _____ Fed. _____

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on October 29, 1973, and is included in Exhibit "A", p. 12.

QUESTION PRESENTED

Whether or not petitioner as a matter of law was accorded his constitutional rights under Amendments V and VI of the United States Constitution, to trial by an impartial jury and to Due Process of Law?

STATEMENT

On November 10, 1972, a Grand Jury in Omaha, Nebraska, returned a one-count indictment against the defendant, charging him with Knowingly and Intentionally Distributing to an Agent of the United States Government, a Controlled Substance, to-wit: Heroin in violation of U.S.C. Title 21, Section 841 (a) (1).

Trial was had on January 16 and 17, 1973, resulting in a verdict of guilty. The jury of twelve was selected from a panel of twenty-eight, and two alternates were selected from a panel of four. Of the twenty-eight called from which the twelve regular jurors were selected fourteen had served as jurors in narcotics cases tried in the same Court during the period commencing January 3, 1973. Of the fourteen with previous experience three had served on two juries while the remaining eleven had served on

one. All fourteen had served with other members of the same panel in the previous cases. Of the four called from which the alternates were selected one had served on two previous narcotics cases during the same period. The defendant challenged for cause five of the fourteen heretofore mentioned. None of the same fourteen were challenged by the Government. Of the twelve ultimately selected nine had served as regular jurors in narcotics cases in the two week period immediately preceding this trial and one had served as an alternate.

Defense counsel conducted a voir dire examination of all of the prospective jurors having previous service in narcotics cases in the preceding two week period in the same Court. In response to questions all answered, in substance, that they would not be influenced by their previous experience though in each instance the verdict was guilty, all or a portion of the Government witnesses, to be used in this case testified, and they had served with others in this panel in prior cases. Several indicated they had read an article in the Omaha World-Herald Newspaper the previous Sunday about Government witness and informant Jewell Hutton Jr. entitled "Narcotics Informant is on a Tight Rope."

After the jury verdict of guilty was returned defendant timely filed a motion for a new trial alleging, inter alia, that "the court erred as a matter of law in impaneling the jury because ten members of the jury had been biased and prejudiced by prior repeated exposure to identical cases." The motion was overruled. On February 20, 1973, defendant was sentenced to the custody of the Attorney General of the United States for imprisonment for a period of ten (10) years.

The pertinent evidence elicited by the Government came from its informant, supra., who identified the defendant as the

person who made the sale charged in the indictment. Corroborating evidence was circumstantial. Defendant testified in his own behalf. He denied that he made the sale or that he knew or had ever seen the informant on the premises of the "Northside Recreation Club" where the sale is alleged to have been made.

REASONS FOR GRANTING THE WRIT

1. The Trial Court erred in overruling Defendant's Motion for a New Trial for the reason that he was denied his constitutional right to trial by a fair and impartial jury.

Amendment VI of the Constitution of the United States reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by a fair and impartial jury * * * ."

Christian v. State of Maine, 268 A. 2d 620 (1970) states:

> "Constitutional guarantee of an impartial trial encompasses the right to be tried by an impartial jury."

The writer cites *Priestly v. State,* 19 Ariz. 317, 171 P. 137, 3 A.L.R. 1201 and *People v. Mol,* 137 Mich. 692, 100 N.W. 913, though State Court decisions, because of their holdings that a defendant in a criminal case does not receive a fair and impartial trial where some of the jury members have previously served on a jury at the trial of another defendant charged with a similar but independent offense and witnesses who testified for the prosecution at the first trial were also used to establish the guilt of the defendant at the second trial. Chief Justice Marshall in *1 Burr's Trial,* 414, 415, 25 Fed. Cas. 14, 692, at p. 50 wrote:

> "[One] may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the

> jury because it suspects prejudice; because in general persons in a similar situation would feel prejudice."

In behalf of the petitioner it is submitted that the twelve jurors ultimately trying this case and the veniremen from whom they were chosen were prejudiced per se. The theory of implied bias certainly has valid application here.

2. Coincident with the thesis that the defendant did not have a fair and impartial trial by jury under Amendment VI of the Constitution of the United States it is contended that he was not accorded his constitutional right to Due Process under Amendment V of that same document.

Betts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 Ed. 1595, states,

> "Due Process of Law is secured against invasion by the Federal Government by the Fifth Amendment and is safe guarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

In *Dennis v. U.S.*, 339 U.S. 176, 70 S. Ct. 519 Justice Black, dissenting wrote,

> "Every procedure which would offer a possible temptation as a Judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter Due Process of Law."

The test is not changed by substitution of the word jury for that of Judge. In *Steve Casias v. United States*, 315 F. 2d 614 (10th Cir.) where the Court divided evenly on the question of whether or not a conviction should be reversed Chief Judge Murrah quoted with favor, *160 A.L.R.*, 732, as follows,

> "[H]aving passed upon the credibility of witnesses in a similar case upon substantially the same testimony, in having theretofore rendered a verdict on their oaths, it is not to be believed that they [would] sit upon this case with such an opinion previously formed without influencing their action."

The opinion of the United States Court of Appeals Eighth Circuit, which is Appendix "A" herein, states that the per se theory of implied bias has been heretofore rejected by it in *Johnson v. United States*, 73-1197 (8th Cir., July 24, 1973). In this connection the Court must have had some reservations, however, because in *U.S. v. Williams* and *U.S. v. Swanson*, 73-1151 (8th Cir.) the following language appears in a Per Curiam opinion,

> "As this Court stated in *Johnson, supra, we do not endorse the procedure followed here* as being preferred or the most desirable. Still we cannot say that its use is reversible error in the absence of some showing of actual prejudice." (Italics supplied.)

It is submitted that coincident with his failure to receive a trial by a fair and impartial jury defendant has been denied Due Process of Law under Amendment V of the Constitution of the United States.

CONCLUSION

For all of the foregoing reasons, this Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 73-1174

United States of America,

Appellee,

v.

Clifford Jones,

Appellant.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: October 17, 1973.

Filed: October 29, 1973.

Before Heaney, Ross and Stephenson, Circuit Judges.

Per Curiam.

Clifford Jones was tried and convicted, by a jury, of violating the provisions of 21 U.S.C. §842 (a) (1) — intentional and knowing distribution of heroin. From that conviction Jones appeals. We affirm.

On appeal Jones asserts three assignments of error: (1) he was denied a fair and impartial jury; (2) the district court erred in admitting exhibits 1, 2 and 3, exhibits relating to the narcotics involved in the crime; and (3) the district court erred when it gave instructions 8 and 11. We shall consider each ground separately.

I. *The Jury.*

Jones claims that he was denied a fair trial because nine of the twelve members of the jury had served as jurors in other narcotics cases involving the same government witnesses and one had served as an alternate. None of the members of the jury which heard this case were challenged for cause by Jones. Counsel for the defendant was aware of the past experiences of the panel members, and voir dire was conducted with respect to determining whether the past experiences of these prospective jurors would bias them. No bias was found. We have heretofore rejected the per se theory of implied bias advanced by Jones. *United States v. Williams,* 73-1150, 1151 (8th Cir., July 24, 1973); *Johnson v. United States,* 73-1197 (8th Cir., July 24, 1973). We find no actual bias, and this case is therefore governed by the rule established in *United States v. Williams, supra,* and *Johnson v. United States, supra.*

II. *Chain of Custody.*

The lock seal envelope, Exhibit 1, containing narcotics, Exhibit 3, was received by a government "evidence technician" at the laboratory of the Bureau of Narcotics and Dangerous Drugs on November 22, 1972. The technician was not called as a witness. On December 13, 1972, Van Sickle, a government chemist took these two exhibits from the evidence vault and conducted chemical tests to determine the nature of the substance. He then placed these exhibits in another lock seal envelope, Exhibit 2, and placed them in a vault. Van Sickle was called to testify at trial.

Objection is made to the introduction of this evidence because it is asserted that the "chain of custody" was not properly established because of the failure of the evidence technician to testify. This failure is said to render the admission of the evidence objectionable for lack of a proper foundation. We disagree.

As we have recently said:

> The criteria governing admission of exhibits into evidence is that there must be a showing that the physical exhibits being offered is in substantially the same condition as when the crime was committed. That determination is to be made by the trial judge, not the jury, and may not be overturned except for a clear abuse of discretion. Factors to be considered in making the determination of admissibility include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of others tampering with it. If upon the consideration of such factors, the trial judge is satisfied that in reasonable probability the article has not been changed in any important respect, he may permit its introduction in evidence. *United States v. Brown,* 73-1135 (8th Cir., Aug. 8, 1973).

In sum, "[w]hile the government might have provided further information as to * * * the receiving and storing procedures at the laboratory in Chicago, we do not find these omissions significant." *United States v. Jackson,* 73-1093 (8th Cir., Aug. 9, 1973). In this case there was no evidence introduced to indicate that the exhibits had been tampered with. Both the chemist who examined the material and the agent who obtained the material testified. The agent testified that he obtained the material, transported it to Kansas City, Missouri, placed it in a lock seal envelope, mailed it, by registered mail, return receipt requested, to the laboratory. He testified that the material offered as evidence was in the same condition as when he received it. The chemist testified that the material was received at the laboratory, and was placed in the evidence vault. Thereafter it was examined and again placed in the evidence vault. We can find no error in the admission of this evidence.

III. *The Instructions.*

Objection is made to instruction 8, which contains the following language:

> [T]he proof of the circumstances surrounding the transaction can supply an adequate basis for finding that the defendant acted knowingly and intentionally. Thus, you may consider the evidence which you recall and believe about the defendant's actual knowledge and intent and, in general, the manner in which the transactions were conducted.

Jones claims this instruction was erroneous because the only evidence pertaining to the sale was direct, and not circumstantial, and, therefore, the instruction was not applicable to this case. Jones claims that the jury might have been misled into believing that there was some other evidence presented by the government, when in fact there was not.

We note that "knowledge and intent, because of their nature, must largely be proved by circumstantial evidence." *Jackson v. United States,* 330 F. 2d 679, 681 (8th Cir.), *cert. denied,* 379 U.S. 855 (1964). *See also United States v. Lawson,* 73-1110 (8th Cir., Aug. 20, 1973). In this case, the circumstances of the transaction recounted by the purchaser, such as the price paid for the goods, are necessary to establish that Jones knowingly and intentionally distributed an illicit substance. Indeed at trial there was some ambiguity relative to the purchaser's request, i.e., he wanted some "stuff." We think, therefore, that the trial judge could properly instruct the jury to consider the circumstances of the transaction, such as the price paid for the goods. While the purchaser could recount what Jones did, " 'there can be no eye witness account of the state of mind with which the acts were done * * * .' " *United States v. Lawson, supra.*

Objection is also made to instruction 11:

> [T]he government is not required to prove any essential element of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

Jones claims that the instruction may have been confusing because there was only one witness who testified to the actual sale. We do not understand how the jury was confused by this instruction, and it appears to be a correct statement of the law. *See, e.g.*, VII J. WIGMORE, WIGMORE ON EVIDENCE §2034 at 259 (3d ed. 1940); 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§71.16 and 71.17 at 140 (1970).

For the reasons hereinbefore expressed the judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.